

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of: BWBC, Inc.

Serial No.: 76 / 711077

Filed: March 30, 2012.

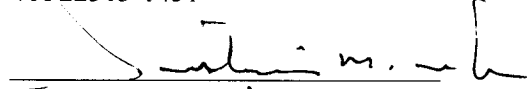
Mark: COW CREEK

Examiner: Michael Webster

Law Office: 102

Trademark Trial and Appeal Board,
U.S. Patent and Trademark Office
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JUSTIN M. WELCH (printed name) Nov. 17, 2014
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NOTICE OF APPEAL

Applicant hereby appeals to the Trademark Trial and Appeal Board from the decision of the Trademark Examining Attorney refusing registration.

This Appeal is taken for the Mark in International Class 032.

Enclosed find the following:

1. The required fee of \$100.00 as prescribed by 37 C.F.R. §2.6(a)(18);
2. A duplicate copy of this sheet; and,
3. Applicant's Brief.

Dated: Nov. 17, 2014

Respectfully submitted,


JUSTIN M. WELCH
Texas State Bar No.: 24003876
ATTORNEY FOR PLAINTIFFS



11-19-2014

U.S. Patent & TMO/TM Mail Rcpt Dt. #

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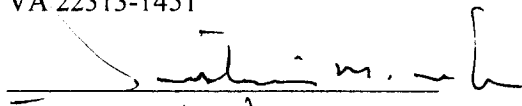
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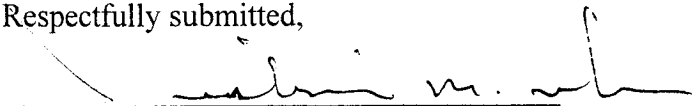
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BRIEF FOR APPLICANT-APPELLANT

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I. INTRODUCTION & RELIEF REQUESTED.

Pursuant to a Notice of Appeal filed with the Trademark Trial and Appeal Board, Applicant respectfully requests that the Trademark Trial and Appeal Board (a) reverse the Examining Attorney's decision to refuse registration of Applicant's mark, COW CREEK, in International Class 032, and (b) issue a notice of publication for the mark. Specifically, the Examining Attorney found a likelihood of confusion between COW CREEK and the Registrant's marks, BULL CREEK BREWING and the logo with identical wording,



U.S. Registration Nos. 4,529,978 and 4,529,979, respectively.

II. STATEMENT OF FACTS.

On March 30, 2012, Applicant filed its use-based application for registration of its mark, COW CREEK, on the Principal Register for "Beer, International Class 032."

In a Suspension Notice dated July 16, 2012, the Examining Attorney suspended consideration of the application, contending COW CREEK was likely to be confused with the then pending intent-to-use applications for BULL CREEK BREWING for "beer, craft beer, and

ales,” as well as a logo with the same text (collectively, “Bull Creek Brewing” marks). These pending applications were assigned serial numbers 85 / 448076 and 85 / 448127, respectively.

Applicant responded to the Suspension Notice on July 27, 2012, urging, among other things, that a cow is generally considered a female bovine, while a bull is commonly considered the male; and, as a result, there is no likelihood of consumer confusion. The Examining Attorney disagreed and issued his second Suspension Notice on August 3, 2012.

The BULL CREEK BREWING marks were registered in mid-2014, and on September 9, 2014, the Examining Attorney (a) removed the COW CREEK application from suspension, and (b) issued his first Office Action letter. The letter expanded on the Examining Attorney’s rationale for the confusion finding, and included his response to the Applicant’s arguments in its July 27, 2012, letter.

Applicant responded to the Office Action letter on September 18, 2014. The Examining Attorney rejected these arguments in his second Office Action letter on October 23, 2014, declaring his rejection final.

As argued below, Applicant respectfully disagrees with the Examining Attorney’s rationale, and asks that the mark be approved for publication.

III. ARGUMENT.

A) THE DEFINITIONS OF “COW” AND “BULL.”

The gravamen of the Examining Attorney’s argument is that “cow” and “bull” are interchangeable: “Because the term ‘cow’ would also include a bull, the commercial impression of each mark is *nearly identical*.”¹ He bases this on an “informal” definition from www.dictionary.com that defines “cow” as gender neutral.

The Examining Attorney begrudgingly concedes that the primary definition of every

¹ See pp.1-2 of Sept. 9, 2014, Office Action letter.

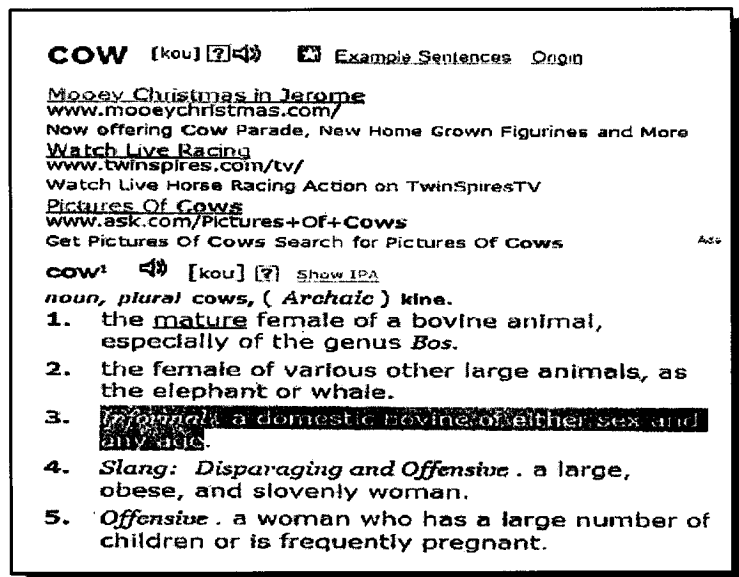
dictionary entry submitted by both him and the Applicant defines “cow” as the female bovine. He also concedes that “bull” exclusively refers to the male bovine. However, he argues in favor of the “informal” definition of “cow” because the “average consumer of beer” would not distinguish between a cow and a bull:

“[B]ecause consumers are not likely to think about specific biological differences between a bull and a cow when choosing a beer. . . . The general impression to the *average consumer of beer* is that a cow would include a male bovine.”²

As demonstrated below, the examining attorney has submitted no evidence (1) that the “informal” definition is more commonly known than the primary definition, or (2) of what the “average consumer of beer” understands “cow” to mean. And on the contrary, the evidence of common usage set forth below demonstrates otherwise.

i. Dictionary Definitions.

In its first Suspension Notice, the Examining Attorney concluded that consumers are likely to confuse a “cow” for a “bull” based exclusively on the “informal” definition of “cow” found at www.dictionary.com: That is, “a domestic bovine of either sex and any age.”³



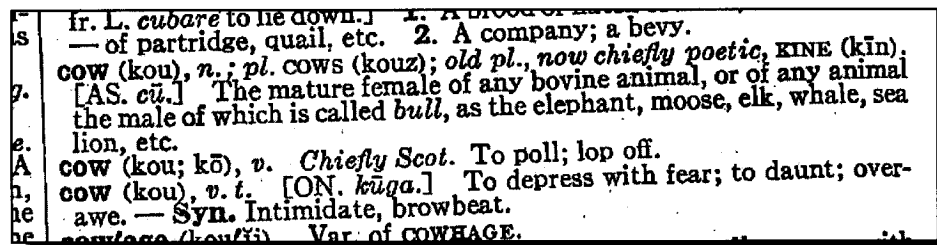
² See p.2 of Sept. 9, 2014, Office Action letter.

³ See definition attached to July 16, 2012, Suspension Notice.

The Examining Attorney appended no other evidence to his letter. Based on this definition, he concludes “[b]ecause the term ‘cow’ would also include a bull, the commercial impression of each mark is *nearly identical*.”⁴

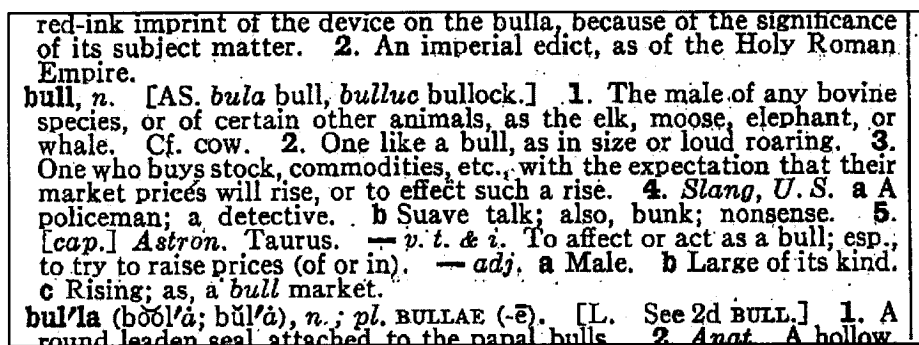
In relying on the “informal” definition, the Examining Attorney skipped over the two primary definitions for “cow” – *i.e.* that it is either “the mature *female* of a bovine animal” or “the *female* of various other large animals, as the elephant or whale.”

Applicant responded to the suspension letter with definitions of “cow” and “bull” from other dictionaries, demonstrating that the primary and most recognized definitions of “cow” and “bull” distinguish the terms on gender. For example, Webster’s New Collegiate Dictionary defines “cow” as the female bovine, *and expressly distinguishes a “cow” from a “bull.”*⁵



Moreover, Webster’s definition does not even include the “informal” definition that the examining attorney found at www.dictionary.com.

Webster’s defines “bull” as “[t]he male of any bovine species . . . Cf. cow.”⁶



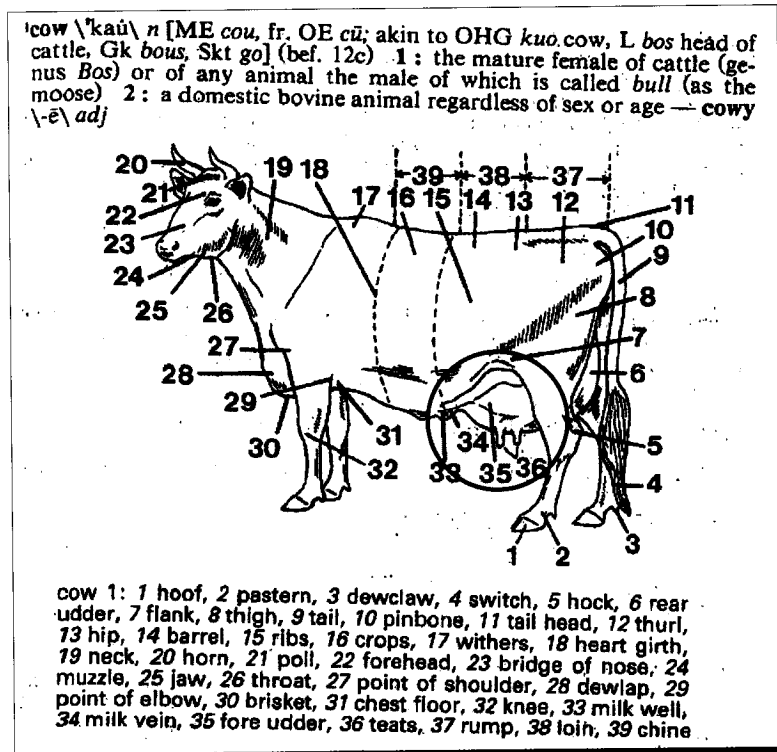
⁴ See pp.1-2 of Sept. 9, 2014, Office Action letter.

⁵ See definition at Exh. D of July 27, 2012, response to Suspension Notice.

⁶ *Id.*

Like its definition for “cow,” Webster’s expressly differentiates a “cow” and a “bull” based on gender, directing the reader to compare the definition of “bull” to that for “cow,” with the notation “Cf. cow.” “Cf.” of course means “to examine the character or qualities of, for the purpose of discovering their resemblances *or differences*.”⁷ Here, Webster’s obviously used “Cf.” to invite the reader to note the “differences” in the definitions because one refers to the male bovine, and the other the female.

Webster’s Ninth New Collegiate Dictionary similarly lists the first definition as “the mature *female* of cattle . . . or of any animal the male of which is called *bull*,” again expressly distinguishing a cow from a bull. It then depicts a “cow” as the female, complete with “milk well,” “milk vein,” “fore udder,” and “teats.”⁸

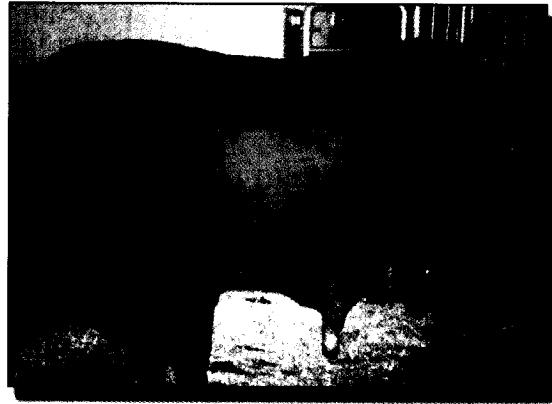


Therefore, it is reasonable to presume Webster’s chose to depict “cow” as a female because it is the most commonly known definition. Stated differently, had some other subset of the bovine

⁷ See WEBSTER’S NEW COLLEGIATE DICTIONARY.

⁸ See definition at p.3 of Exh. G of Sept. 18, 2014, response to Office Action letter.

species been commonly associated with “cow” – *e.g.*, a bull – the illustration would have been very different. For example, Applicant included the following photographs of a cow (left) and bull (right) in its July 27, 2012, response to the Suspension Letter, just in case the anatomical differences were not clear:



In his October 23, 2014, Office Action letter, the Examining Attorney submitted two additional definitions from dictionaries other than www.dictionary.com.⁹ The two primary definitions are the same as those from Webster’s, defining “cow” as the female animal, with at least one entry distinguishing “cow” from “bull,” noting “the male of such animals is called a *bull*.”¹⁰ And as with Webster’s and www.dictionary.com, it is not until the third definition that any of them include the gender neutral definition.

This leads to an additional point: All of the dictionary definitions submitted by the Examining Attorney and Applicant number their definitions. This numbering supports the conclusion that most people associate “cow” and “bull” with separate genders, and do not consider them gender neutral. Specifically, the Wikipedia entry for “dictionary” explains the purpose of the numbering:

“In a general dictionary, each word may have multiple meanings. Some dictionaries include each separate meaning in the *order of most common*

⁹ See entries from American Heritage and American English Dictionaries attached to Oct. 23, 2014, Office Action letter.

¹⁰ See entry 2 of the American English Dictionary.

*usage while others list definitions in historical order, with the oldest usage first.”*¹¹

Webster’s dictionary, relied on by Applicant, uses the latter:

“The order of senses within an entry is historical: The sense known to have been first used in English is entered first. This is not to be taken to mean, however, that each sense of a multisense word developed from the immediately preceding sense.”¹²

Regardless of methodology, the most understood definition is listed first – *i.e.* it is either the “most common usage,” the one used in the English language the longest and therefore most well known, or both. This is why the definition of “cow” from www.dictionary.com used by the examining attorney is listed third and identified as “informal” – *i.e.*, it is the least common, has been in use the least amount of time, or both. Stated similarly, it is why the two primary definitions that distinguish a cow based on gender are listed first – *i.e.*, they are the most common, have been used the longest, or both. And again, Webster’s Ninth New Collegiate Dictionary chose to depict a “cow” based on the first definition. Indeed, *every dictionary cited by either party lists the gender specific definition first*, and some do not even include the Examining Attorney’s definition at all.

A final point regarding dictionary definitions: The Examining Attorney argues that “Applicant has not provided any legal support for its contention that *using an informal definition is improper.*”¹³ This misunderstands Applicant’s argument. Specifically, Applicant does not contend use of an “informal” definition is *legally* improper. Rather, it is improper *on the facts here* because (1) the Examining Attorney concluded, without evidentiary support, that the “informal” definition is the one the “average consumer of beer” would recognize, and (2) his conclusion is contrary to Applicant’s evidence.

¹¹ See Wikipedia printout at Exh. F of Sept. 18, 2014, response to Office Action letter.

¹² See p.2 of Exh. G of Sept. 18, 2014, response to Office Action letter..

¹³ See p.1 of Oct. 23, 2014, Office Action letter.

Now, on to Applicant's evidence of common usage.

**B) EVIDENCE OF COMMON USAGE
OF "COW" AND "BULL."**

i. Brewery's Use of "Bull" v. "Cow".

In the Examining Attorney's September 9, 2014, Office Action letter, he claimed he

"referenced the informal definition of 'COW' because consumers are not likely to think about specific biological differences between a bull and a cow when choosing a beer. . . The general impression *to the average consumer of beer* is that a cow would include a male bovine."¹⁴

The statement was not supported by any evidence as required by TMEP §710.01.¹⁵ Moreover, at least one brewer has selected "bull" based expressly on its gender distinction, which is direct evidence of how the "average purchaser of beer" would differentiate "cow" and "bull."

Specifically, the Huffington Post reports that Wynkoop Brewery in Denver is making a "Bull Testicle Beer" that will be sold nationwide in two-packs. The article is attached as Exhibit I of Applicant's September 18, 2014, response. As noted on its label, the beer incorporates bull testicles as an ingredient: "stout made with *bull* testicles."¹⁶ The article comments "[w]hen a beer is made with real *bull* testicles, there is really only one way to sell it: in pairs."¹⁷ Not once is "cow" used in the article or on the bottle's label.

It is a reasonable conclusion that "bull" is used because consumers and readers would be confused had the article referenced "cow testicles," or had the beer been called "Cow Testicle Beer." Or, at least both the brewer and author felt the need to be grammatically correct or risk heavy criticism from consumers for confusing a bull and cow. Regardless, it is evidence of how the "average purchaser of beer" defines the two terms.

¹⁴ See p.2 of Sept. 9, 2014, Office Action letter (emphasis added).

¹⁵ See TMEP §710.01 (stating "the examining attorney must always support his or her action with relevant evidence . . .").

¹⁶ See p.1 of Exh. I of Sept. 18, 2014, response to Office Action letter.

¹⁷ Id.

The Examining Attorney dismissed this evidence with the unsupported statement that any conclusions drawn from the article are “based on assumptions,” and “[t]herefore, the article is unsupportive.”¹⁸ On the contrary, it is clear that the brewery and article used “bull” instead of “cow” because use of the latter would have made them look illiterate and naive to beer consumers, who know that cows do not have testicles.

ii. Geographic Places Distinguished by “Cow” and “Bull.”

There is geographic evidence that Bull Creek and Cow Creek are unlikely to be confused. Specifically, there are several places throughout the United States where people have named creeks “Cow Creek” and “Bull Creek” despite the fact the creeks are within a few miles of one another. For example, a satellite view from Google Earth is enclosed at Exhibit B of Applicant’s July 27, 2012, response, showing Bull Creek and Cow Creek near Pecos, New Mexico, only a couple of miles from one another. Indeed, Bull Creek flows into Cow Creek.

As another example, Bull Creek and Cow Creek are tributaries of the Missouri River in Montana, with mouths located only a few miles from another. Specifically, Applicant’s July 27, 2012, response enclosed an article from Wikipedia, stating “[j]ust downstream from the mouth of Cow Creek is the mouth of Bull Creek,” all under the title “Homesteading on the Missouri River Bottoms at the Mouth of Cow Creek and Bull Creek.”¹⁹ A screen shot of the two rivers from Google Earth shows the two creeks only 11 miles apart.²⁰

The point is this: Whoever named the two waterways obviously found “Cow” and “Bull” sufficiently distinctive that nobody was likely to mistake one for the other, even though they are in very close proximity. If the Examining Attorney’s conclusion were accepted – *i.e.*, that the

¹⁸ See p.4 of Oct. 23, 2014, Office Action letter.

¹⁹ See pp.7-8 of Wikipedia article at Exh. B of the July 27, 2012, response to Suspension Letter (citing Monahan, Glenn; Biggs, Chanler (1999, 2001). *Montana's Wild and Scenic Upper Missouri River*. Northern Rocky Mountain Books. pp. 170, 717. ISBN 0-9711214-0-0)).

²⁰ See Exh. C of the July 27, 2012, response to Suspension Letter.

impression created by “cow” and “bull” are “nearly identical”²¹ – then those naming the creeks would have chosen different names in order to avoid confusion about which creek was which.

The Examining Attorney rejected this evidence without evidentiary or legal support, making the conclusory statement that “likelihood of confusion is not a consideration for naming geographic places or things.”²² On the contrary, that is the exact purpose when naming a geographic place – *i.e.*, to distinguish one location from another so that people do not confuse the two. For example, Washington D.C. was not named “Alexandria” because they are in close proximity, and had they been identically named, people would be confused about whether “Alexandria” referenced the nation’s capital, or the city just across the Potomac River.

Applied here, cows and bulls are sufficiently different words that people would not confuse the two and think the two creeks were the same. They will similarly not confuse the two beers.

iii. “Cow” v. “Bull” in the Marketplace.

As additional evidence of the common usage of “cow” and “bull,” Applicant attached screenshots from the website www.cattle-exchange.com, which appears to be the equivalent of Craig’s List for buying cattle.²³ Not once are cows referred to as gender neutral. Specifically, on pages one through three, there are repeated instances where “cow” and “bull” are used to differentiate females and uncircumcised males. For example, under “Quick Search for Cattle” on page one, the user can select from six different varieties of cattle, including “cows” and “bulls.” On page two, the user can “Find Cattle by Class” by clicking on varieties of cattle including “cows” and “bulls.” And, at the bottom of page three under “Cattle for Sale,” varieties of cattle are listed including, again, “cows” and “bulls.” When clicking on any of the links for

²¹ See p.2 of Sept. 9th, 2014, Office Action letter.

²² See p.2 of Sept. 9th, 2014, Office Action letter.

²³ See printouts at Exh. H of Applicant’s Sept. 18, 2014, response.

“cows” or “bulls,” the user is taken to pages entitled “Cows for sale” or “Bulls for sale.”²⁴ These pages distinguish based on gender as evidenced by the pictures of cattle for sale that show either female or male bovines.

The Examining Attorney dismissed this evidence as “irrelevant to the refusal,” because “[t]he website is specifically directed to consumers of cattle . . . *Clearly, the consumers using this website would not be considered to be in the demographic of the average beer consumer.*”²⁵ Again, the Examining Attorney failed to support the contention with any evidence as required by TMEP §710.01.²⁶ And to the contrary, in 2014 the beef cattle industry generated \$71 billion in revenues.²⁷ So, there is every reason to think that a large number of “average beer consumer[s]” are participants in that industry.

Moreover, even if the Examining Attorney’s protest were valid that “the website is specifically directed to consumers of cattle,” it does explain his conclusory dismissal of “Bull Testicle Beer” which is specifically directed to consumers of beer.

Applicant also included screenshots of a website from LSU’s veterinary school demonstrating usage of “cow” and “bull” based on gender, and never in the “informal” sense.²⁸ The website is entitled “Bull Breeding Soundness Examination” or “BSE,” and implores cattle breeders to test the fertility and fecundity of their breeding bulls:

- The first question we should ask is 'Why do a bull BSE?'
 - Economically, it has been shown to pay a \$17.00/cow (1970s dollars) return on the BSE the investment of bull BSE.
 - That is \$17/cow, not per bull.
 - If you figure that a bull is usually exposed to about 30 cows.....do the math.
- When do you want to do a bull BSE?
 - A bull BSE should be performed before purchasing a bull, if fertility problems are a concern, or 30 -60 days prebreeding.

²⁴ See pp.4-5 of Id.

²⁵ See p.4 of Oct. 23, 2014, Office Action letter.

²⁶ See TMEP §710.01 (stating “the examining attorney must always support his or her action with relevant evidence . . .”).

²⁷ See <http://www.statista.com/statistics/296398/revenue-beef-cattle-production-in-the-us/> (showing revenues from beef cattle from 2009 to 2014).

²⁸ See Exh. E of July 27, 2012, response to Suspension Notice.

It makes clear that the test is for “bulls,” not “cows.” Specifically, it notes that the test “has been shown to pay a \$17.00/cow . . . return on the investment of bull BSE.” It then clarifies, noting that the BSE returns an investment of “\$17.00/cow, not per bull. If you figure that a bull is usually exposed to about 30 cows . . . do the math.” That is, you pay for the test on the bull, who then impregnates “about 30 cows,” therefore more than paying for the test. The site then proceeds to describe the test, not once using “cows” in the gender neutral sense.

The examining attorney dismissed the evidence, claiming use of the terms by “veterinarians or veterinary medical school students” does not equate usage by “the average purchaser of beer.”²⁹ First, the article was not limited to veterinarians, but rather envisioned a much broader audience including participants in the \$71 billion beef cattle industry – a point noted above.³⁰ More importantly, the examining attorney *again* submitted no evidence to support his conclusory statement regarding the demographics or preferences of the “average purchaser of beer,” as required by TMEP §710.01.³¹

C) LEGAL SUPPORT FOR DISTINGUISHING “COW” AND “BULL.”

The Examining Attorney justifies reliance on the “informal” definition, citing *Sealed Air v. Scott Paper* for his proposition that “[c]onsumers are more likely to think *informally* and retain a general commercial impression of the marks.”³² First, *Sealed Air* does not say consumers think “informally,” and in this regard the Examining Attorney has extended the holding beyond its text. Indeed, there is no legal deference to what consumers would think of “informally,” versus the actual, formal meaning of the word. Rather, “[t]he test is whether the marks are sufficiently similar to deceive an ordinarily prudent buyer – *not a careless buyer who makes no*

²⁹ See p.2 of Sept. 9th Office Action letter.

³⁰ See <http://www.statista.com/statistics/296398/revenue-beef-cattle-production-in-the-us/> (showing revenues from beef cattle from 2009 to 2014).

³¹ See TMEP §710.01 (stating “the examining attorney must always support his or her action with relevant evidence . . .”).

³² See p.2 of Sept. 9 Office Action letter (citing *Sealed Air Corp v. Scott Paper Co.*, 190 U.S.P.Q. 106, 108 (TTAB 1975)).

examination.”³³

Therefore, based on the common usage of “cow” and “bull” demonstrated above, the ordinarily prudent buyer is not likely to confuse the two beers.

i. “Bull” and “Cow” not Interchangeable or Synonymous.

However, even assuming *arguendo* that the “average consumer of beer” is not the “ordinarily prudent buyer,” but rather a “careless buyer who makes no examination” familiar only with the “informal” definition of “cow,” the terms are still not confusingly similar. Specifically, the Examining Attorney does not deny that “bull” is a distinct subset of “cow” based on his “informal” definition.³⁴ That is, even if “cow” were defined as gender neutral under the “informal” definition, there is no denying that a “bull” is solely gender specific for a male, uncircumcised bovine. *Therefore, the terms are not interchangeable or synonymous.* That is, although someone might use the informal definition of “cow” to refer to a bull, “bull” cannot be used to refer to a cow, gender neutral or otherwise. For example, nobody would ever look at a field of bovines of unknown gender and say, “look at that field of bulls.” Unless, of course, they were actually looking at a field of uncircumcised, male bovines. Nor would anyone look a cow being milked, and comment “milking a bull takes a lot of work.” Indeed, the examining attorney included evidence of some common clichés that make this point, including “like a bull in a china shop,” and “take the bull by the horns.”³⁵ Nobody would ever substitute “cow” for “bull” and hope to make sense; or at least avoid being laughed at. That is, the phrases note the propensity of an uncircumcised male bovine to be violent, in contrast to the female bovine that is generally docile.

Therefore, “bull” is a *subset* of “cow;” again assuming one accepts the “informal”

³³ *Dawn Donut Company, Inc. v. Daylight Donut Flour Company*, 450 F.2d 332, 333 (10th Cir. 1971).

³⁴ See p.2 of Sept. 9, 2014, Office Action letter (stating “[b]ecause the term ‘cow’ would also *include* a bull, the commercial impression of each mark is *nearly identical*.”)

³⁵ See p.2 of MacMillan Dictionary attached to Sept. 9, 2014, Office Action letter.

definition. And, both the TTAB and various Circuit Courts of Appeal have held there was no likelihood of confusion when one word was a distinct subset of another – *i.e.*, when the terms or not “interchangeable” or otherwise “synonymous.” For example, in *Hat Corp. v. John B. Stetson*, a company opposed registration of “Railbird”, arguing it created a likelihood of consumer confusion with its registered mark, “Game Bird”.³⁶ Specifically, opposer submitted Webster’s definition of “railbird,” meaning “[a]ny bird of the family Rallidoe . . . a favorite game bird.”³⁷ It argued that because “railbird” was a subset of “game bird,” the terms were “synonymous,” resulting in a likelihood of consumer confusion.³⁸ The Court of Customs and Patent Appeals disagreed, holding confusion to be unlikely because (1) of differences in appearance and (2) that a “railbird” is a subset of “game bird:”

“[A]lthough it appears that the term ‘game bird’ is generic to the term ‘railbird,’ we feel that this fact of itself would not be likely to cause confusion because, as we have indicated above, the words do not sound alike or look alike, and *for the further reason that we do not feel that the popular or ordinary meanings of the terms are identical, one word merely being a species of the other.*”³⁹

In *Dawn Donut v. Daylight Donut*, an opposer argued “Dawn Donut” and “Daylight Donuts” had similar meanings because “Dawn” is a form of “Daylight.”⁴⁰ The Tenth Circuit Court of Appeals disagreed, holding that “the words are not *synonymous*” because “‘Dawn’ connotes the first appearance of light at morning,” whereas “‘Daylight’ includes all of the period when the sun is shining . . .”⁴¹ That is, “dawn” is a subset of “daylight,” and the Tenth Circuit concluded there was “no similarity in meaning, appearance, or sound.”⁴²

On identical grounds, the TTAB found no similarity in meaning in *Rousch Bakery*

³⁶ *Hat Corporation of America v. John B. Stetson Company*, 223 F.2d 485, 486-487 (C.C.P.A. 1995).

³⁷ *Id.* at 486.

³⁸ *Id.* at 487.

³⁹ *Id.* at 489.

⁴⁰ *Dawn Donut Company, Inc. v. Daylight Donut Flour Company*, 450 F.2d 332, 333 (10th Cir. 1971).

⁴¹ *Id.*

⁴² *Id.*

Products v. Mountain Mamma.⁴³ Specifically, the registrant of “Hillbilly” opposed registration of “Mountain Momma”, both marks being used for bread.⁴⁴ The opposer argued “that ‘Mountain Mamma’ is a hillbilly term and that the *definition of hillbilly encompasses a mountain momma.*”⁴⁵ The TTAB found that, although, a “mountain mamma” could certainly be a subset of “hillbilly,” it had its own distinct meaning and therefore, “the marks would readily distinguish the product of the contending parties. We find no likelihood of confusion or mistake.”⁴⁶ The TTAB cited **Dawn Donut** in support of its finding.

Applying these cases here, “bull” has a very specific meaning that is different from “cow,” even if one accepts the Examining Attorney’s “informal” definition. That is, like the three cases discusses, “bull” is at worst a subset of “cow.”

In addition, **Dawn Donut** noted that “dawn” has other meanings including “freshness,” whereas “daylight” does not; thereby further distinguishing the two marks.⁴⁷ Applied here, “cow” has other meanings – *i.e.* the female bovine – and in this regard, it is very different than “bull.”

Of course, TMEP §1201.01(b)(v) allows comparison of meaning to determine likelihood of confusion. However, the case law cited by the section makes the point that meanings must typically be *interchangeable* or *synonymous*:

“**Gastown, Inc., of Del. v. Gas City, Ltd.**, 187 U.S.P.Q. 760 (TTAB 1975) (holding GAS CITY (“GAS” disclaimed) for gasoline, and GASTOWN for gasoline, diesel fuel, kerosene, and vehicle supply and maintenance services, likely to cause confusion); **Watercare Corp. v. Midwesco-Enterprise, Inc.**, 171 U.S.P.Q. 696 (TTAB 1971) (holding AQUA-CARE (stylized, with and without

⁴³ **Roush Bakery Products Co., Inc. v. Mountain Mamma, Inc.**, 185 U.S.P.Q. 55 (TTAB 1974) (Westlaw citation 1974 WL 20145).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 2-3.

⁴⁷ *Id.*

design) and WATERCARE (stylized), both for water-conditioning products, likely to cause confusion).”⁴⁸

In *Gastown*, the TTAB found that the use of “town” and “city” in “Gas City” and “Gastown”, respectively, were likely to cause confusion because the terms “are generally used interchangeably in describing the same geographical division.”⁴⁹ And in *Watercare v. Midwesco*, the TTAB found that “aqua” and “water” as used in “Aqua-Care” and “Watercare”, were likely to cause consumer confusion because the terms “are synonyms for one another.”⁵⁰

And as a final example, the Court of Customs and Patent Appeals in *Hancock v. American Steel* found a likelihood of confusion between “Cyclone” and “Tornado” because they were “synonymous” and “identical.”⁵¹

Applied here, and as already described above with examples, “bull” would never be used “interchangeably” with or as a “synonym” for “cow,” either under the primary or “informal” definitions of “cow.”

CONCLUSION.

The primary definitions of “cow” and “bull” demonstrate that they are gender specific, and the evidence of usage discussed above supports this. Stating the obvious, the terms developed different meanings so people could distinguish male and female bovines. And in the case of “bull,” the term differentiates circumcised from uncircumcised bovines; the latter being called a “steer.” For this reason, nobody is likely to confuse “cow” and “bull.” To demonstrate the point, substitute the following sets of terms into the phrase “_____ Creek” – the former being the male and the latter the female – and ask whether anyone would confuse the two beers: Hen v. Rooster; Bitch v. Dog; and Sow v. Boar.

Or, if you accept the Examining Attorney’s “informal” definition, again insert the

⁴⁸ See discussion in TMEP §1201.01(b)(v).

⁴⁹ *Gastown, Inc., of Del. v. Gas City, Ltd.*, 187 U.S.P.Q. 760 (TTAB 1975).

⁵⁰ *Watercare Corp. v. Midwesco-Enterprise, Inc.*, 171 U.S.P.Q. 696 (TTAB 1971).

⁵¹ See *Hancock v. American Steel & Wire Co. of N.J.*, 203 F.2d 737, 740 (C.C.P.A. 1953)

following sets of terms into the same phrase – the former being the gender neutral and the latter gender specific – and ask again whether anyone would confuse the two beers: Chicken v. Rooster; Dog v. Bitch; Human v. Male; Elephant v. Bull; and Pig v. Boar.

Indeed, the Examining Attorney's reasoning taken to its ultimate conclusion, would bar anyone from registering a mark for their beer that included any variant on a bovine, followed by "creek." That is, the registration for "Bull Creek Brewery" would prohibit registration of "Heifer Creek," "Calf Creek," or "Steer Creek."

Applicant respectfully contends that for reasons discussed above, "Cow Creek" is not likely to cause confusion with "Bull Creek Brewery", and that a notice of publication should issue for the Applicant's mark in International Class 032.

Respectfully submitted,



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